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No. 07-0752

2007 - 2233

SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

NOVOLOG BUCKS COUNTY,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Third Circuit ("Third Circuit") correctly held that parties that accept the delivery of freight and who are named as consignees on bills of lading are subject to liability for demurrage charges arising after they accept delivery, unless they act as agents of another and disclose that agency in compliance with the notification procedures established by the Interstate Commerce Commission Termination Act's ("ICCTA") consignee-agent liability provision at 49 U.S.C. § 10743(a)(1).

2. Whether the Third Circuit's holding creates a genuine conflict with the Seventh Circuit's resolution of similar issues in *Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse*, 337 F.3d 813 (7th Cir. 2003), *Blanchette v. Hub City Terminals*, 683 F.2d 1008 (7th Cir. 1981) and *Evans Products Co., et al. v. I.C.C., et al.*, 729 F.2d 1107 (7th Cir. 1984).

RULE 29(6) CORPORATE DISCLOSURE STATEMENT

CSX Corporation is the parent corporation of respondent CSX Transportation, Inc. ("CSX"),[1] is publicly held, and owns more than ten (10) percent of respondent's stock.

[1] Respondent's correct corporate name is "CSX Transportation, Inc."

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COUNTER-STATEMENT OF THE CASE

A. Proceedings below

In August of 2004, respondent CSX, a rail common carrier, brought this lawsuit against petitioner Novolog Bucks County ("Novolog"), an entity which operates a facility that receives delivery of steel by railcar, and ships steel by railcar, in the United States District Court for the Eastern District of Pennsylvania, in case number 04-CV-4018. CSX filed suit to recover unpaid demurrage charges incurred by Novolog during 2002 and 2003. Demurrage is a daily fee imposed for the possession and use of railroad owned railcars beyond the allowed "free-time" permitted by published tariff for loading or unloading. *CSX Trans. Co. v. Novolog Bucks County*, 502 F.3d 247, 251, note 1 (3d Cir. 2007), Appendix to Petition for Writ of Certiorari, App. at 4.[2]

After the close of discovery, the parties filed cross motions for summary judgment, each seeking judgment with respect to, *inter alia*, CSX's demurrage claims.[3]

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[2] References to Petitioner's Appendix hereinafter appear as follows: "App. at [appendix page No.]."

[3] In its Statement of the Case, Novolog inaccurately summarizes the basis for CSX's claim that Novolog was the consignee for all inbound freight at issue as set forth in CSX's motion for summary judgment. Petition for Writ of Certiorari ("Pet.") at 8 – 9. Novolog was the consignee (1) because it was identified as such on the bills of lading and (2) because it accepted the freight when it was delivered to the facility. Moreover, CSX never asserted that "Novolog was liable for demurrage as an

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On May 24, 2006, the District Court denied the parties' respective motions, holding that there was a genuine issue of material fact as to whether CSX's demurrage charges arose out of a separate contractual relationship, which the Court deemed to be a pre-requisite for demurrage liability. Both parties moved for reconsideration, and CSX also moved for conditional referral of certain issues to the United States Surface Transportation Board. On June 26, 2006, the District Court denied the parties' motions for reconsideration and CSX's referral motion.

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agent for various unnamed consignees," nor did CSX ever assert that Novolog's agency status was a basis for Novolog's status as a consignee. Pet. at 9. It was Novolog which took the position that it was not a consignee and, therefore, not liable for demurrage because it allegedly,

> never received, processed, or distributed its own goods, or had an interest in the cargo at issue through consignment – Novolog was only a service contractor hired principally by the exporters and, in exceptional circumstances by the manufacturers, to load or discharge their cargo to and from railcars.

Novolog's Statement of Undisputed Facts in Support of Its Motion for Summary Judgment at ¶ 24, App. at 131. By implication, Novolog was arguing that it was an agent, and CSX responded accordingly by correctly arguing that Novolog had not complied with the notice provisions of 49 U.S.C. § 10743(a)(1) and was, therefore, liable for demurrage.

On July 7, 2006, CSX filed an admission with the District Court stating that:

> . . . other than Novolog being the named consignee on bills of lading, and Novolog having accepted delivery of the loaded railcars by CSX, CSX had no separate contractual relationship with Novolog governing the movement and/or disposition of the detained railcars.

The purpose of the CSX admission was two-fold: (1) to establish a predicate for finding that Novolog's own conduct had rendered it a party to the underlying transportation contract and (2) to dispose of the irrelevant factual "issue" of whether Novolog was party to a separate contractual relationship which governed the disposition of detained railcars.

On July 12, 2006, the District Court entered an Order for judgment as a matter of law in favor of Novolog and against CSX with respect to CSX's demurrage claim, effectively granting Novolog's original motion for summary judgment on CSX's demurrage claim. CSX appealed.

In a carefully reasoned opinion, and after briefing and oral argument by the parties and by *amici curiae*, the United States Court of Appeals for the Third Circuit vacated the District Court's entry of summary judgment in Novolog's favor and remanded the case to the District Court for further consideration in light of its holding

regarding consignee liability. The Third Circuit specifically held as follows:

> We hold that recipients of freight who are named as consignees on bills of lading are subject to liability for demurrage charges arising after they accept delivery unless they act as agents of another and comply with the notification procedures established in ICCTA's consignee-agent liability provision, 49 U.S.C. § 10743(a)(1).

Novolog Bucks County, 502 F.3d at 254, App. at 13.[4] This holding is the apparent subject of the instant petition.

B. Material Facts[5]

CSX filed its Amended Complaint seeking to recover

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[4] Elsewhere in its opinion, the Third Circuit also held that an entity named as the sole consignee on a bill of lading is "presumptively liable for demurrage." *Id.* at 250 and 262, App. at 2, and 31 – 32.

[5] The material facts as summarized herein are those on which the Third Circuit and the District Court relied. App. at 3-7, and 38-47, respectively. CSX would also note that, in its Petition, Novolog states that, with respect to various issues, the District Court did or did not render findings of fact. Pet. at 5, 12 and 23. District courts do not make "findings of facts" when resolving a motion for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986). District courts simply determine whether there is a genuine issue of material fact which would prevent it from resolving the case as a matter of law. *See, e.g., CSX*

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payment of inbound and outbound railcar demurrage charges accrued by Novolog and itemized on twelve (12) invoices sent to Novolog on a monthly basis from December, 2002 through August, 2003. The total amount due on all invoices is $260,304.00. Novolog failed to object to any of the monthly invoices for accrued demurrage charges assessed against it by CSX.

For each railcar movement consigned for delivery to Novolog's facility identified in the demurrage bills, Novolog was named as the sole *consignee* on the electronic bill of lading and waybill. For each railcar movement that originated at Novolog's facility identified in the demurrage bills, Novolog was named as the *shipper* (or consignor) on the electronic waybill because it ordered CSX to provide it with the empty railcars for loading for transportation.

Other than Novolog having been named the sole consignee on bills of lading, and Novolog having accepted delivery of the loaded railcars by CSX, CSX had no separate contractual relationship with Novolog governing the movement and/or disposition of the detained railcars.

CSX publishes a tariff subject to the jurisdiction of the United States Surface Transportation Board which governs its rights and obligations to collect demurrage charges. The applicable tariff is CSXT 8100. Novolog received and was aware of this tariff. [6]

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Transportation Co. v. Novolog Bucks County, No. 04-cv-4018, 2006 U.S. Dist. LEXIS 32917, *2, note 1, and *14 – 15 (E.D. Pa. May 24, 2006), App. at 38 and 48.

[6] Pertinent text from CSX Transportation Tariff CSXT 8100, Demurrage Section, Section VIII-C, App. at 85-99.

Novolog was engaged in unloading full railcars and loading empty cars with goods, usually consisting of steel products. With respect to loaded inbound railcars, Novolog received full railcars, unloaded them as the "ship to" party or the consignee, and eventually released the empty railcars back to CSX.

C. Legal basis for the assessment of demurrage charges

Rail carriers such as CSX are required, by statute, to impose demurrage charges on those entities which use freight railcars to ship goods. *See* 49 U.S.C. § 10746[7]; *see also St. Louis, Southwestern Railway Co. v. Mays*, 177 F. Supp. 182, 184 (E.D. Ark. 1959) (rail carriers are "under a duty to collect and the shipper or consignee is under a duty to pay [demurrage].")

Federal courts have consistently held that demurrage charges can be imposed "against a consignor, consignee or owner of the property, *or* others by statute, contract or prevailing custom." *See, e.g., Novolog Bucks County*, 502 F.3d at 254, App. at 13 (principle that demurrage may be imposed against a consignor, consignee or owner of the property, or on others by statute, contract, or prevailing custom is both "well-established and oft-repeated") (citations omitted); *Illinois Central Railroad Co., v. South Tec Development Warehouse, Inc.*, 337 F.3d 813, 820 (7th Cir. 2003) ("[defendant] would be liable only if it were a consignee *or* if it contractually assumed responsibility for the demurrage charge") (emphasis added); *see also*

[7] The complete text of the statute is set forth in Pet. at 3.

Evans Products Co., et al. v. I.C.C., et al., 729 F.2d 1107, 1113 (7th Cir. 1984).

It is equally "well-established and oft-repeated" that a "consignee becomes a party to the transportation contract, and is therefore bound by it, upon accepting the freight; thus it is subject to liability for transportation charges even in the absence of a separate contractual agreement . . .". *Novolog Bucks County*, 502 F.3d at 254 – 255, App. at 13; *see also Louisville & Nashville Ry. Co. v. Central Iron & Coal Co.*, 265 U.S. 59, 70, 44 S. Ct. 441, 68 L. Ed. 900 (1924) ("if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery, or not until later"); *Erie R. Co. v. Waite*, 62 Misc. 372, 114 N.Y.S. 1115 (1909) (demurrage may be imposed upon consignees independently of statute or express contract); *Gage v. Morse*, 94 Mass. 410, 12 Allen 410, 90 Am. Dec. 155 (Mass. 1866) ("[i]f the consignee will take the goods, he adopts the contract"); *Zarati S.S. Co., v. Park Bridge Corp.*, 154 F.2d 377, 380 (2d Cir. 1946) (a consignee who is "not a party to the original contract and so is not bound to accept the cargo at any particular time, and, therefore, incurs no responsibility for delay according to the terms of the contract . . . *may be liable for damages in the nature of demurrage for unreasonable and improper detention in the unloading of the vessel.*") (emphasis added) (citations omitted).

A consignee who is an agent for a disclosed principal, however, is not liable for demurrage. *Union Pacific*

Railroad Co. v. Ametek, Inc., 104 F.3d 558, 563 (3d Cir. 1997), *citing Middle Atlantic Conference v. ICC*, 353 F. Supp. 1109 (D.D.C. 1972). Furthermore, if the bills of lading governing a particular shipment identify the consignee as a "care of" party, the agency relationship is deemed to have been disclosed, and the consignee-agent is not subject to liability for demurrage charges. *Novolog Bucks County,* 502 F.3d at 258, note 12, App. at 22 (citations omitted).

A consignee who is acting in the capacity of an agent of a principal, but whose agency has not been disclosed to the carrier, either expressly on the bill of lading or otherwise, may, however, avoid demurrage liability by providing written notice of the agency relationship to the carrier. *Novolog Bucks County,* 502 F.3d at 255 – 56, App. at 15 – 16. The requirement for such notice is set forth at 49 U.S.C. § 10743(a)(1)[8]. *Id.* In the instant case, Novolog has not and does not allege that it ever provided CSX with any notice of its alleged agency.

REASONS FOR DENYING THE PETITION

A. THERE IS NO REAL CONFLICT BETWEEN THE THIRD AND SEVENTH CIRCUITS ON THE ISSUE OF DEMURRAGE LIABILITY WHICH REQUIRES RESOLUTION BY THIS COURT.

The basis for Novolog's Petition for Writ of Certiorari is an alleged conflict between the Third

[8] The language of the statute is set forth in Petitioner's Brief at 2 – 3.

Circuit's holding in *Novolog Bucks County* and several decisions rendered by the Seventh Circuit, primarily *Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse,* 337 F.3d 813 (7th Cir. 2003).[9] There is, however, no real or genuine conflict between the decisions rendered by the circuit courts of appeal. The so-called conflict is based upon language which appears in *South Tec,* and which is nothing more than *dicta* taken out of context. Moreover, the factual bases for each of the decisions are substantially different and readily distinguishable.

1. The decision rendered by the Third Circuit is not in conflict with the *South Tec* decision rendered by the Seventh Circuit.

In *South Tec,* the United States Court of Appeal for the Seventh Circuit ("the Seventh Circuit") reviewed a district court's entry of summary judgment in favor of a rail carrier seeking to recover demurrage charges from a warehouse which had received shipments of freight.[10] The district court had held that 49 U.S.C. § 10743(a)(1) applied to the defendant, that the defendant had not complied with that statute, and, therefore, the defendant was liable for demurrage. The district court, however, did not make a finding that the defendant was the consignee on the bills of lading.

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[9] The other decisions are *Blanchette v. Hub City Terminals,* 683 F.2d 1008 (7th Cir. 1981) and *Evans Products Co., et al. v. I.C.C., et al.,* 729 F.2d 1107 (7th Cir. 1984) both of which are addressed below.

[10] The Third Circuit summarized the facts giving rise to the demurrage claim in *South Tec. Novolog Bucks County,* 502 F.3d at 259 – 260, App. at 25.

In reversing the district court, the Seventh Circuit first noted that section 10743(1)(a) "applies only to agents who are also consignees, and not to agents who are *not* consignees." *South Tec*, 337 F.3d at 817 (citations omitted) (emphasis in original). The Seventh Circuit refused to apply § 10743(a)(1) because there was no factual basis to do so in light of the fact that whether or not the defendant was a consignee was a question that had never been answered by the district court. *Id.*

Notably, the Seventh Court stated that, "*[i]n order for us to uphold the application of [section 10743(a)(1)]*, the district court . . . must have found South Tec to be the consignee of the disputed shipments." *Id.* (emphasis added). The clear, unambiguous implication of that statement is that, had there been a finding by the district court that the defendant was the consignee named on the bills of lading, the Seventh Circuit would have applied section 10743(a)(1) when determining whether the defendant's status as a consignee – agent protected it from demurrage liability.[11]

Rather then reach its own determination of whether the defendant was a consignee, the Seventh Circuit remanded that issue back to the district court. *Id.* at 820. Before doing so, however, it "briefly consider[ed] whether the district court's assumption that South Tec

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[11] That consignee status is a necessary predicate for application of section 10743(a)(1) is further buttressed by the Seventh Circuit's instruction to the district court on remand where it said, "[t]o the extent that the agency status of a legal consignee may be a factor, the notice provisions of 49 U.S.C. § 10743(a)(1) may still be relevant." *Id.* at 821.

was a consignee may have been correct."[12] *Id.* The Seventh Circuit's "consideration" of that assumption involved examining "somewhat analogous situations" addressed in three prior court decisions; *CSX Transportation, Inc. v. City of Pensacola*, 936 F. Supp. 880 (N.D. Fla. 1995), *Southern Pac. Transp. Co. v. Matson Navigation Co.*, 383 F. Supp. 154 (N.D. Cal. 1974), and *Evans Products Co. v. I.C.C.*, 729 F.2d 1107 (7th Cir. 1984). *Id.*, at 821.

The cases which the Seventh Circuit "considered" were, in fact, analogous to the case before it. For example, in *City of Pensacola*, the defendant had not been identified as a consignee on a single bill of lading, *City of Pensacola*, 936 F. Supp. at 883, and the *City of Pensacola* court relied on that fact when deciding that the defendant was not liable for demurrage. *South Tec*, 337 F.3d at 821. In *Matson*, the defendant did not appear as the consignee on most of the bills of lading which originated with the same shipper, *Matson*, 383 F. Supp. at 155, and the *Matson* court relied on that fact when it decided that the defendant was not liable for demurrage. *South Tec*, 337 F.3d at 821. The Seventh Circuit was appropriately giving due consideration to cases which were analogous to the case at hand in that the *South Tec* defendant had been identified as the consignee on no more than ten percent of the bills of lading at issue, all of which had been issued by the same shipper. *South Tec*, 337 F.3d at 821. The other ninety percent of the bills of lading identified other entities as the consignee. *Id.*

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[12] Not surprisingly, Novolog characterized the Seventh Circuit's "brief" consideration of several cases as a "survey [of] the existing law on demurrage . . .". Pet. at 17.

The factual basis for the Third Circuit's holding in *Novolog Bucks County*, however, stands in stark contrast to the factual basis for the Seventh Circuit's *dicta* in *South Tec*. In *South Tec*, the defendant appeared as consignee on no more than ten percent of the bills of lading. On the remaining ninety percent of the bills of lading, a different entity was identified to the rail carrier as the consignee. Novolog, however, appeared as the sole consignee on every single bill of lading at issue. As the sole named consignee, Novolog accepted the freight when CSX delivered it to Novolog's facility. On the basis of those undisputed facts, the Third Circuit applied "well-established and oft-repeated principles" and determined that Novolog was "presumptively liable for demurrage charges." *Novolog Bucks County*, 502 F.3d at 250, App. at 2.

Once the Third Circuit had determined that Novolog was presumptively liable for demurrage, it completed the analysis by determining whether Novolog had acted as another's agent and had complied with section 10743(a)(1). *Id.* at 262, App. at 31-32. That last step in the Third Circuit's analysis was not in conflict with the Seventh Circuit's analysis, but instead, was entirely consistent with what the Seventh Circuit had said it would have done if there had been a finding by the district court that the *South Tec* defendant was a consignee, i.e., it would have "[upheld] the application of [§ 10743(a)(1)]". *South Tec.*, 337 F.3d at 817.

Not only is there an absence of any "conflict" between the Third Circuit and the Seventh Circuit with respect to how each would apply § 10743(a)(1) in a demurrage context, there is also no conflict between the Third Circuit's holding that Novolog is a legal consignee with demurrage liability and the Seventh Circuit's *suggestion* that perhaps the *South Tec* defendant *might not be* a consignee. The Third Circuit applied well-established legal principles to a situation where the defendant (1) was the sole, named consignee on the bills of lading and (2) had accepted delivery of the freight. Similarly, the Seventh Circuit gave due consideration to cases where the defendant had only been identified as the consignee on a small percentage of bills of lading (*Matson*), or had not been identified as such at all (*City of Pensacola*), which was certainly appropriate in light of the fact that those cases were factually analogous to the case it was deciding. In fact, the Seventh Circuit stated that simply being "listed . . . as a consignee on *some* bills of lading is not alone enough to make South Tec . . . liable for demurrage charges . . .". *South Tec*, 337 F.3d at 821 (emphasis added). That the Third Circuit reached a different conclusion than the Seventh Circuit *might have reached* with regard to the consignee status of the respective defendants is neither surprising, nor is it evidence of a "conflict" in light of the distinguishable fact patterns presented in each case.[13]

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[13] The Third Circuit's determination of Novolog's consignee status also corrected the District Court's erroneous holding that a railroad's right to impose demurrage *must* arise out of "a contractual relationship regarding railcars with the entity that detained the railcars." *See Novolog Bucks County*, 2000 U.S. Dist. LEXIS 32917, *25, App. at 56. The District Court's holding was

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South Tec is also distinguishable from *Novolog Bucks County* in that the defendant in *South Tec* had "reported" that the rail carrier "understood [the defendant] not to be a consignee but an agent of [a third party]". *South Tec*, 337 F.3d at 821. In the instant case, however, there was no evidence adduced in the proceedings below that would indicate or even suggest that CSX knew or had reason to know that Novolog was conducting itself as anyone's "agent." Novolog certainly offered no such evidence to the District Court in support of its motion for summary judgment.[14] *See* Pertinent text of Novolog's Statement of Undisputed Facts in Support of Motion for Summary Judgment in *CSX Transp. Co. v. Novolog Bucks County, No. 04-CV-4018, filed January 6, 2006*, App. at 123 – 131. Furthermore, Novolog makes no such argument in the instant Petition for Writ of Certiorari. *See* Pet. at 10.

The Third Circuit actually *held* that Novolog was a consignee which had not complied with the requirements of section 10743(a)(1) and was, therefore, liable for demurrage based on facts which were not in dispute. On the other hand, the Seventh Circuit only *suggested* that

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in direct conflict with the *South Tec* and *Evans* decisions, *see* Counter-Statement of the Case, *supra* at section I(c), both of which held that liability for demurrage could be imposed on a consignee *or* as the result of a contractual obligation to pay demurrage.

[14] Notwithstanding the monthly receipt of demurrage invoices from CSX over a period of several months, Novolog never responded to any invoice with protest or disclosure of an agency relationship with a disclosed principal.

South Tec *might not be* a consignee based on substantially dissimilar facts, and remanded the ultimate determination of South Tec's status to the district court. The Seventh Circuit also indicated that it would have applied section 10743(a)(1) if South Tec had been determined to be a consignee. Had the Third Circuit and the Seventh Circuit been presented with identical or at least similar facts, and had the two circuits rendered conflicting or inconsistent rulings based on those facts, then perhaps Rule 10(a) of the Rules of the United States Supreme Court might be implicated. This, however, is not the case. Instead, Novolog attempts to create a conflict where one does not exist solely for the purpose of manufacturing a basis for writ of certiorari.

2. The decision rendered by the Third Circuit is not in conflict with the Seventh Circuit's decision in *Blanchette v. Hub City Terminals*.

Novolog also argues that the Third Circuit's application of § 10743(a)(1) to demurrage charges is in conflict with another decision by the Seventh Circuit in *Blanchette v. Hub City Terminals*, 683 F.2d 1008 (7th Cir. 1981). Pet. at 27. A careful reading of *Blanchette*, however, reveals that, again, Novolog has identified a "conflict" which is simply non-existent.

Blanchette involved a claim for demurrage charges asserted by the trustee of Penn Central, a rail carrier, against Hub City, a freight consolidator. Penn Central argued that, since Hub City was always either the consignor or the consignee of the shipments, it was the entity liable for the detention charges. *Blanchette*, 683 F.2d at 1009. Hub City countered by arguing, *inter alia*,

that 49 U.S.C. § 3(2)(1976), which was the predecessor statute to § 10743(a)(1), relieved it of liability for detention charges. *Id.* at 1010-1011.

Although Novolog argues that, in *Blanchette*, the Seventh Circuit "interpreted [the predecessor statute] as not applying to detention charges", Pet. at 27, the Seventh Circuit did nothing of the sort.[15] The Seventh Circuit first recognized that "[t]he purpose of this section of [the predecessor statute] was to relieve from liability agent-consignees who paid in full carriers' *initial* bills, which the carrier *later discovered* were lower than the rate required by the tariff." *Blanchette*, 683 F.2d at 1011 (emphasis added). The Court then noted that Penn Central had submitted the entire bill to Hub City, and that "[n]o additional amounts were later found to be due under the tariff. Rather, the railroad billed Hub City for the amounts due to it for line transportation and trailer detention charges." *Id.* Since Penn Central's claim did not involve "later discovered" charges, the Court refused to apply the predecessor statute. More importantly, the Seventh Circuit never said that the predecessor statute did not apply to detention charges.

Curiously, when the Seventh Circuit indicated in *South Tec* that it would, in fact, apply section 10743(a)(1)

[15] Novolog's argument comes *verbatim* from the Third Circuit's discussion of *Blanchette*. *Novolog Bucks County*, 501 F.3d at 257, note 9, App. at 18. The Third Circuit's reference to *Blanchette's* treatment of "detention charges", when read in context, appears to relate solely to the detention charges at issue in the *Blanchette* case. Novolog, however, has taken the Third Circuit's statement out of context and has characterized it as a general rule to be applied to all detention charges regardless of the context.

to a demurrage claim if the defendant were a consignee, it gave no consideration at all to its prior decision in *Blanchette*. Apparently, the Seventh Circuit did not believe that it had ever held or even had ever intimated that section 10743(a)(1) would not apply to detention charges.[16]

The Third Circuit's reference to the *Blanchette* decision does not create a conflict. The Third Circuit did acknowledge that the "purpose" of the predecessor statute was indeed as stated by the Seventh Circuit in *Blanchette*. *Novolog Bucks County*, 502 F.3d at 257, note 9, App. at 18. The Third Circuit also recognized, however, that the predecessor statute may have had multiple purposes, and that the Seventh Circuit's treatment of the statute in *Blanchette* "by no means excludes its applicability to other kinds of charges that can arise after delivery. Thus we decline to so limit its reach." *Id.* The Third Circuit did nothing more than recognize that the scope of section 10743(a)(1) was not limited to only "later discovered" freight, line haul charges.

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[16] Novolog also recognizes that the *South Tec* decision is not inconsistent with the *Blanchette* decision. Pet. at 26, note 14. Novolog, however, in acknowledging that consistency, misstates the conclusions reached by the *South Tec* court. The Seventh Circuit did not, as stated by Novolog in note 14, conclude that the district court erred by holding a warehouse liable for demurrage charges simply because of non-compliance with section 10473(a)(1). As fully discussed above, the Seventh Circuit reversed the district court because it had applied section 10743(a)(1) without having made a factual finding that the defendant was a consignee. *South Tec*, 337 F.3d at 817.

3. The decision rendered by the Third Circuit is not in conflict with the Seventh Circuit's decision in *Evans Products Co. v. I.C.C.*

Novolog also makes an implied argument that the Third Circuit's decision is in conflict with the Seventh Circuit's decision in *Evans Products Co., et al. v. I.C.C., et al.*, 729 F.2d 1107 (7th Cir. 1984). Pet. at 18 – 19. The issue in *Evans* was whether switching charges could be imposed upon car repair facilities simply because repair facilities were named in a tariff. The Seventh Circuit held that there could be no liability because repair facilities "... are not consignors or consignees of the cars because delivery of the cars as freight is not completed and the carrier's lien is not extinguished when the repair facility receives the car." *Evans Products*, 729 F.2d at 1113. The operative facts of *Evans* stand in stark contrast to the instant case, wherein Novolog was unquestionably the only named consignee, the cars were delivered and accepted by Novolog, and CSX's lien was extinguished upon Novolog's receipt of the car.

The Seventh Circuit's holding in *Evans* has no application to the facts of this case, as Novolog was clearly the named consignee and acted as such in taking accepting delivery of the goods consigned to it under multiple bills of lading. The fact that the Third Circuit correctly determined that *Evans* was distinguishable on its facts and, therefore, not "particularly instructive" is certainly not an indication that the circuits are in conflict. *See Novolog Bucks County*, 502 F.3d at 262, note 14, App. at 31.

B. THE THIRD CIRCUIT'S REFUSAL TO "FOLLOW" THE *SOUTH TEC* DECISION IS CONSISTENT WITH AND SUPPORTIVE OF CLEAR CONGRESSIONAL INTENT WITH RESPECT TO NATIONAL TRANSPORTATION POLICY.

Notwithstanding the fact that there is no real, genuine conflict between the circuits on these issues, the Third Circuit did, in fact, expressly "decline to follow the Court of Appeals for the Seventh Circuit's recent conclusion in [*South Tec*] that the entity listed as the consignee on the relevant bills of lading was not, without more, the legal consignee under section 10743."[17] *Novolog Bucks County*, 502 F.3d at 259, App. at 25. The Third Circuit identified several reasons why it chose not to follow the literal language used by the Seventh Circuit in *South Tec*, not the least of which is that "the *South Tec* court's approach frustrates the statute's intent . . .". *Novolog Bucks County*, 502 F.3d at 260, App. at 27.

The Third Circuit recognized that the clear intent of section 10743(a)(1), as discerned directly from the language of the statute itself, neither contemplates nor supports the " 'designation-plus' " interpretation of the statute suggested by the Seventh Circuit in *South Tec*. *Id.*, at 260, App. at 27. The Third Circuit also correctly noted that, under the *South Tec* analysis, section 10743(a)(1)'s notification provisions would apply

[17] While the Third Circuit clearly indicated that the literal application of the Seventh Circuit's comment was incorrect, the Seventh Circuit's comment appears to have been directed to the circumstance presented in *South Tec*, where 90% of the bills of lading identify entities other than the defendant as the consignee, and only 10% show the defendant as consignee.

"only when the carrier does not already have notice – through other bills of lading or otherwise – that the named consignee is acting as the agent of another." *Id.* The Third Circuit recognized the impracticality and inefficiency of such a result. *Id.* Moreover, if Congress had intended such a result, it could have drafted language that would have accomplished that result. The Third Circuit correctly concluded that adopting the Seventh Circuit's literal comment to the clear, unambiguous language of the statute would frustrate the "statute's clear rule." *Id.*

The Third Circuit's refusal to "follow" *South Tec* is also correctly grounded in national transportation policy, which Congress expressly incorporated into the demurrage statute, and which is set forth at 49 U.S.C. § 10746.[18] *See Novolog Bucks County*, 502 F.3d at 258 – 59, App. at 23 – 24. The Third Circuit first noted that "[c]ompensation of the railroads for the use of their equipment is a secondary purpose of demurrage charges", *Novolog Bucks County*, 502 F.3d at 259, App. at 23 (citations omitted), and then succinctly explained how its holding, in conjunction with the plain meaning of section 10743, is consistent with and supportive of national transportation policy:

> For demurrage charges to fulfill their purpose of ensuring the smooth functioning of the rail freight system by creating disincentives against delays, railways must be able to assess them effectively and without being mired in disputes. Section 10743 is designed to ensure

[18] The text of this statute can be found in Pet. at 3.

> just that. The simple rule that the named consignee becomes liable for demurrage charges upon acceptance of the freight unless it timely notifies the carrier of an agency relationship allows railroads to rely on the bills of lading and avoid wasteful attempts to recover from the wrong parties. For their part, recipients of freight who should not be saddled with liability for transportation charges arising after delivery can escape it with little effort by simply providing written notice of their status to the carrier.

Novolog Bucks County, 502 F.3d at 259, App. at 23 – 24. To hold otherwise would require every rail carrier to investigate the identity of the true, undisclosed consignee on every bill of lading for every shipment made by rail.

C. THE THIRD CIRCUIT'S RULING ON DEMURRAGE LIABILITY IS BOTH FAIR AND JUST.

Novolog argues that its petition should be granted because the Third Circuit's decision is "inherently inequitable to Novolog . . . and thus, fails to serve the interests of justice." Pet. at 20. Novolog's stated reason for arguing "the equities" is that the Seventh Circuit's demurrage decisions are "inherently more equitable than the Third Circuit's" analysis. Pet. at 24. Regardless of whether or not there is any merit to Novolog's equitable arguments (and CSX does not concede that there is), the mere fact that one circuit's application of the law may be "fairer" than another circuit's application is hardly evidence of a split between the circuits.

Moreover, the fact that one circuit's actual application of a statute may be perceived to be less equitable to one party than how another circuit might apply the same statute is hardly evidence of judicial error.

In arguing that equitable considerations should, somehow, provide a basis for granting its petition, Novolog first complains that, since it had nothing to do with the preparation of the bills of lading, it therefore had no control over its liability for demurrage. Pet. at 21. Novolog's argument is, however, essentially nothing more than an "ignorance of the law" defense, in that, to accept the argument, a court would first have to believe that Novolog did not know (1) that the bill of lading prepared for every shipment of freight identifies both the shipper and the consignee, (2) that a carrier is allowed to deliver freight only to the entity identified as the consignee on the bill of lading, (3) that acceptance of the freight by the consignee renders the consignee a party to the transportation contract, and (4) that rail carriers are required by statute to charge for demurrage when their railcars are detained by consignors or consignees for periods longer than the "grace period" set forth in the demurrage tariffs of rail carriers. In the unlikely event that a court would actually find that Novolog was ignorant of all of those well-settled principles, it would then have to hold that ignorance of the law is a defense. Novolog's argument rings hollow and must be rejected out of hand.

Novolog then argues that "CSX had recourse under its tariff . . . to impose any requisite demurrage charges

upon its shipper-customers." Pet. at 23. That argument flies in the face of CSX's tariff which expressly states that,

> [u]nless otherwise advised, in WRITING, that another party is willing to accept responsibility for demurrage, *consignor at origin* or *consignee at destination* will be responsible for the payment of demurrage charges.

CSX Transportation Tariff CSXT 8100, Section VIII-C, Demurrage Plan – Item 8070(G), App. at 93 (emphasis added). On its face, CSX's tariff prevents CSX from collecting demurrage charges at destination for delays in unloading from anyone other than the consignee, and also prevents it from collecting demurrage charges at origin for delays in loading from anyone other than the consignor.

In support of its "recourse" argument, Novolog notes that the District Court had similarly concluded that CSX would have recourse against entities other than Novolog for demurrage charges which arose from Novolog's failure to unload or load railcars in a timely fashion.[19] Pet. at 23. The District Court was similarly wrong. The Third Circuit, however, was certainly aware of the limitations which CSX's tariff places on CSX's ability to pursue its shippers for demurrage charges incurred by

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[19] In its Petition, Novolog portrays itself as a victim of the steel shippers' unauthorized designation of Novolog as consignee. If this is true, Novolog would presumably have recourse against such shippers – yet Novolog has asserted no such claims.

consignees. *See Novolog Bucks County*, 502 F.3d at 251, App. at 4-5. Presumably, the absence of any recognition or discussion of a "recourse remedy" in the Third Circuit's opinion results directly from its understanding of CSX's tariff limitations.

Novolog also argues "that CSX had notice from Novolog of the final destinations of the actual consignees and shipper/consignors – none of which were Novolog," implying that CSX somehow had notice that Novolog was not the actual consignee on the shipments at issue. Pet. at 10 and 23. A rail carrier such as CSX, however, has no reason to know of or care about the "final destination" of freight unless that destination is the rail destination identified on the bill of lading as the consignee, which in this case was always Novolog. In support of its argument, Novolog refers to the District Court's discussion of CSX's documentation of its claim. Pet. at 23 – 24 and App. at 44 – 45. A careful reading of the District Court's discussion, however, reveals that CSX's documentation included, among other things, 198 pages of waybills listing Novolog as the shipper and various steel companies as consignees, and 563 pages of waybills listing Novolog as the consignee and various steel companies as the shipper. App. at 45.

CONCLUSION

For the reasons more fully set forth herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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